because the President's authority over the country's foreign relations is plenary, it follows that the decisions of those in the Executive Branch to whom he has delegated that authority – including the Treasury Department in its role as administrator of the embargo on Cuba – are entitled to very great deference. *See Regan v. Wald*, 468 U.S. at 242 (citing *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952), "[m]atters relating 'to the conduct of foreign relations. . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'" *See also United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 320 (1936) (describing "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations").

Perhaps no non-governmental organization in the country possesses experience (and hence expertise) comparable to the NFTC's in assessing the scope and efficacy of this country's foreign economic sanctions programs. A frequently mentioned fact of the post-World War II era of international relations is that such programs have proliferated.[4] Instead of being deployed as a last resort, trade embargos and other economic sanctions have often become the tools of first choice in the pursuit of this nation's foreign policy goals. Too frequently the sanctions imposed end up falling heavily on the U.S. corporate sector in terms of lost overseas trade opportunities, which, in turn, often translate into lost American jobs. For this reason the NFTC has long counseled caution in the imposition of

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[4] *See* Testimony of Under Secretary of State Stuart Eizenstat before the Subcommittee on Trade of the House Committee on Ways and Means, *Hearing on the Effect and Use of Unilateral Trade Sanctions*, October 23, 1997. ("The U.S. has applied sanctions for foreign policy purposes a total of 115 times since World War I, 104 times since World War II . . . ").

economic sanctions. It has warned repeatedly that sanctions, at the very least, should not be deployed without a review of (i) their impact on United States companies engaged in international trade, (ii) the likelihood of their success in achieving a desired foreign policy goal and (iii) their conformity to this country's international treaty commitments.

However, with or without the concurrence of organizations like the NFTC, the current President and his successors will doubtless continue to institute new economic sanctions programs in support of U.S. foreign policy goals. When that happens it is no longer the wisdom of the United States' mode of achieving its foreign policy goals that is at issue. What *is* at issue is, in fact, the central issue in *this* case: Whether the judiciary should, in the absence of a statutory directive *clearly* to the contrary, continue its historical and constitutional deference to the Executive Branch in its interpretation of the scope and application of the U.S. sanctions programs it has been charged by Congress with promulgating and administering? As has been long recognized, such deference is most acutely required where there is the possibility of a clash between the interpretation or implementation of a particular federal regulation and a United States' treaty obligation – which was precisely the situation in the *Cohiba* case.

Obviously no embargo or other United States' economic sanctions program lasts forever. Foreign governments change as rapidly and frequently as heads of state such as Manuel Noriega, Slobodan Milosevic and Saddam Hussein are displaced. The important point is that with each such change of government in a country under sanctions, there is inevitably a desire by U.S. companies to resume trade with the previously embargoed country. That desire is shared and promoted by the United States Government on dual pragmatic grounds, (i) U.S. exports support U.S. jobs and (ii) the resumption of trade relations

with previously sanctioned countries strengthens good political relations with those countries. However, resumption of trade with a previously sanctioned country depends on maintaining extant, over the life of a particular embargo, treaties that govern and facilitate that trade. It is a simple truth that in today's global economy no nation-to-nation trade occurs outside the framework of bilateral or multilateral treaties that define the scope and nature of that commerce.

It is therefore of enormous importance that U.S. economic sanctions programs that, by their very nature are temporary, are *not* applied by the courts in ways that breach and therefore terminate this country's reciprocal treaty obligations with countries upon which those sanctions have been transiently imposed. This is especially so with respect to treaties for the protection of intellectual property rights. The problem is an obvious one. If the U.S. breaches its treaty obligation to protect a foreign national's trademark in this country during the life of an embargo, the country of origin of that trademark is, by operation of public international law, relieved of its obligation to protect U.S.-origin trademarks there. Because intellectual property rights exemplify the concept of the zero sum game (i.e., there can be only one winner (holder) of a trademark in any country), the loss of official protection of a U.S. company's mark in a particular country will inevitably be a foreign company's gain. But the loss to that U.S. company can extend well beyond simply losing the market for its branded product in a single country. Where there is a gap in a country's global web of trademark registrations there is always the possibility of the counterfeiting of trademarked goods. Those goods almost always find their way into third-country markets. Once there, they displace the market for the genuine U.S. trademarked article and because of typically poor quality control, they lessen the reputation of that brand. In the case of "well-known marks," the U.S. export sector has the

most to lose through non-compliance with treaty obligations protecting such marks. This vulnerability is a simple factor of U.S. predominance in the production of famous branded products ranging from clothing to food, beverages and a vast range of technology.

The Second Circuit's decision in the *Cohiba* case is particularly troubling because the reciprocal protection of one another's intellectual property rights has been one of very few bright spots in the decades-old United States embargo on Cuba. The Cuban Assets Control Regulations have traditionally allowed Cuban and U.S. owners to freely renew and enforce their trademarks in one another's countries.[5] Those Regulations continue a longstanding Executive Branch policy of maintaining in force reciprocal treaties for the protection of intellectual property rights in order to preserve foreign registered U.S. intellectual property intact during the life of embargoes on sanctioned countries.[6] Congress has concurred in that policy for nearly a century, as is demonstrated in its passage of the Trading with the Enemy Act itself in 1917. That statute specifically authorizes aliens to register trademarks and to bring suits in the U.S. against infringers.[7] TWEA permits companies from embargoed nations to prosecute treaty-based trademark infringement actions even during wartime embargoes. For example, in *G.H. Mumm Champagne v.*

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[5] *See* 31 C.F.R. §§ 515.527, 528.

[6] Cuba enforces the "famous marks" provision of Article 6bis of the Paris Convention on behalf of U.S. companies. *See* Decision No. 833 (*Hard Rock Café*), Popular Supreme Tribunal of Cuba, Civil and Administrative Chamber (1995).

[7] "Any enemy, or ally of enemy, may institute and prosecute suits in equity against any person . . . to enjoin infringement of letters-patent, trademark, print, label, and copyrights in the United States owned or controlled by said enemy or ally of enemy, in the same manner to the extent that he would be entitled to do so if the United States was not at war." 50 U.S.C. App. § 10(g).

Eastern Wine Corp., 142 F.2d 499 (2d Cir.), *cert. denied*, 323 U.S. 715 (1944), the Second Circuit upheld unanimously a trademark infringement action brought by an embargoed French company during World War II. In so doing, the court gave effect to the judgment of both political branches of the government – as embodied in legislation and implementing regulations – that rights to intellectual property secured by international treaty obligations should be enforceable in this country's courts by foreign companies subject to U.S. trade embargoes. This position accords with the common sense approach adopted by the New York Court of Appeals when it said: "... treaty provisions compatible with a state of hostilities, *unless expressly terminated*, will be enforced ... " *Techt v. Hughes*, 229 NY 222 (1920). (Emphasis added). The NFTC is in complete agreement with that statement and suggests that a contemporary declaration from the Court to the same effect in the *Cohiba* case is in the United States' national interest, as that interest surely extends to the competitive participation of U.S. companies in international trade.

II. The Department of the Treasury's Interpretation of the Cuban Embargo Regulations as Permitting Legal Relief to a Cuban Company Under the Paris Convention Was Entitled to Great Deference from The Second Circuit – But it Did Not Receive it

The Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), emphasized that the separation of powers mandated by the Constitution requires courts to defer to the Executive Branch's interpretation of its own regulations. And if Congress has not "'directly spoken to the precise question at issue,' the court must sustain the Executive's interpretation so long

as it is 'based on a permissible construction of the statute.'" *See Auer v. Robbins,* 519 U.S. 452 (1997).

The courts have in particular recognized the need to defer to the Executive Branch's interpretation of statutes and regulations concerning foreign policy and national security. "In matters like this, which involve foreign policy and national security, we are particularly obliged to defer to the discretion of executive agencies interpreting their governing law and regulations." *Paradissiotis v. Rubin,* 171 F.3d 983 (5th Cir. 1999); *see also, e.g., Consarc Corp. v. Treasury Dep't, OFAC,* 71 F.3d 909, 915 (D.C. Cir. 1995) *and Milena Ship Management Co. v. Newcomb,* 995 F.2d 620, 623-624 (5th Cir. 1993). That deference is both appropriate and required "in light of the primacy of the Executive in the conduct of foreign relations and the Executive Branch's lead role in foreign policy." *Taiwan v. United States District Court,* 128 F.3d 712, 718 (9th Cir. 1997) (internal quotation marks omitted).

Contrary to an unbroken line of authority to the same effect, the Second Circuit in the *Cohiba* case accorded no deference whatever to the Treasury Department in its interpretation of the Cuban embargo regulations it drafted, amends periodically and is charged with enforcing. Instead, the court substituted its judgment as to the purpose, scope and application of that embargo. In so doing it decreed the abrogation of a treaty by the U.S., thereby throwing this country's trademark relations with Cuba into uncertainty and potential chaos. The damage to the doctrine of separation of powers created by the *Cohiba* case is of great concern to the NFTC. In the interest of ensuring that the U.S. speaks with one voice in its foreign trade sanctions policies, the NFTC urges the Court to grant review in this case.

III. The Second Circuit's Decision in the *Cohiba* Cigar Case Has Put Thousands of U.S. Trademarks Registered in Cuba at Risk of Losing the Reciprocal Protections of the Paris Convention That They Presently Enjoy

Both customary international law and the law of treaties permit "a party specially affected by the breach [of a multilateral treaty] to invoke it as a ground for suspending the operation of the agreement in whole or in part in the relations between itself and the defaulting state."[8] Suspension by Cuba of the Paris Convention *vis-à-vis* the United States, were it to occur, would result in great uncertainty regarding the present and post-embargo status of the thousands of trademarks U.S. companies, including NFTC members, have registered and maintained in Cuba under 31 C.F.R. § 515.528.[9] Even worse, those marks could well be lost to interlopers if the protections of the Paris Convention are withdrawn or otherwise withheld from U.S. companies.

As a result of the Second Circuit's decision in the *Cohiba* case the Government of Cuba has on several occasions threatened at the United Nations and elsewhere to withdraw the protections it affords U.S. trademarks under the Paris Convention.[10] Whether it will do so or not cannot be known at this time.

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[8] Restatement (Third) of the Foreign Relations Law of the United States, § 335(2)(b) and the Vienna Convention on the Law of Treaties, Article 60(2)(b).

[9] For a very partial list of the U.S. trademarks registered in Cuba *see* <http://www.cubatrade.org/trademark.html>

[10] *See Report by Cuba on Resolution 59/11 of the United Nation's General Assembly*, August 19, 2005, " . . . this decision [i.e., of the Second Circuit in the *Cohiba* case] disregards the United States' international obligations with respect to trade and the protection of trademarks. The logic of this Court of Appeals is that the international obligations of the United States with respect to Cuba should be

(Continued on following page)

But given the experience in South Africa of the NFTC's members (to be described in a moment), *amicus curiae* is unwilling to merely hope that an outcome that could significantly injure the trademark rights of U.S. companies in Cuba does not occur. Hence the filing of this brief.

Because of the Second Circuit's decision in the *Cohiba* case U.S. companies face the likelihood of a repeat of their difficult and, for some, costly experience in South Africa when the United States began lifting its sanctions in the early 1990s. That experience is a cautionary tale that demonstrates the mischief that results when trade embargoes are misapplied and in consequence are allowed to inhibit or destroy reciprocal trademark protections.

Under the U.S. trade embargo of South Africa, U.S. companies were prohibited from paying the fees necessary to either file trademark applications or maintain existing trademark registrations pursuant to various intellectual property treaties. When the embargo ended, a number of U.S. companies with internationally-recognized trademarks, including, *Burger King, Toys R Us, 7 Eleven,* and *Victoria's Secret* discovered that their trademarks in South Africa had been appropriated by unauthorized persons during the apartheid era. This led the U.S. Trade Representative to identify South Africa as a "Special 301" country in 1996.

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governed by the illegitimate and unilateral norms of the hostile economic, commercial and financial blockade imposed on the island ... Cuba warns the international community that if the United States ... usurp[s] internationally prestigious Cuban trademarks protected by international conventions and treaties, a climate of uncertainty and a questioning of these rights could be the result, concretely affecting not only Cuba but also the economic and commercial interest of entities in the United States itself." UN Doc. A/60/213 (Aug. 19, 2005) (Annex), available at http:// daccessdds.un.org/doc/UNDOCGEN/N05/467/14/ PDF/N0546714.pdf

Recovering the rights to their trademarks necessitated lengthy and expensive litigation on the part of U.S. companies and attempts by organizations such as the NFTC to encourage the South African government to amend its laws. It would be most unfortunate if American companies and the NFTC were required to do the same once again with Cuba because of the Second Circuit's decision in the *Cohiba* case.

The instructive tale of South Africa and U.S.-origin trademarks exemplifies the importance of the United States maintaining an intellectual property policy with respect to Cuba that complies with our treaty commitments during the pendency of the trade embargo on that country. The Treasury Department has done so in the *Cohiba* case by construing its regulations to permit appropriate judicial relief to a Cuban company under the Paris Convention. It now needs the support of the Court in its principled endeavor to honor the treaty commitments the United States undertook when it became a signatory to that Convention.

IV. In the Absence of a Clear Statement of Congressional Intent, Courts Must Not Construe a Statute to Abrogate Treaties

The Second Circuit Court of Appeal's decision in the *Cohiba* case is contrary to the unanimous holding of the Second Circuit in *G.H. Mumm Champagne v. Eastern Wine Corp.*, 142 F.2d 299, *supra*, and to the judgment of both political branches dating to World War I – as embodied in treaties, legislation and Treasury Department implementing regulations – that rights to intellectual property and against unfair competition secured by international treaty obligations should be enforceable in U.S. courts by foreign companies which are subject to U.S. trade embargoes.

Congress will not be deemed to have repealed a statute, or abrogated a treaty such as the Paris Convention unless it clearly states an intent to do so.[11] On a point to be more fully developed later when the basis for the Second Circuit's decision is examined (i.e., that a provision of a statute called the LIBERTAD Act silently abrogated U.S. adhesion to the Paris Convention *vis-à-vis* Cuba): "It is a cardinal principle of statutory construction that repeals *by implication* are not favored." *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976). (Emphasis added). That principle applies with particular acuity when construing a statute that might affect a preexisting treaty obligation. "[U]nless Congress makes clear its intent to abrogate a treaty, a court will not lightly infer such intent but will strive to harmonize the conflicting enactments." *Trans World Airlines, Inc. v. Franklin Mint*, 466 U.S. 243, 252 (1984) (referring to the "firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action."); *South African Airways v. Dole*, 817 F.2d 119, 125-126 (D.C. Cir. 1987) (emphasizing need for direct conflict between treaty and later legislation before court will find repeal).

The foregoing cases are only a few of the many examples of Chief Justice Marshall's simple, but powerful, 200 year old maxim of statutory construction: "An act of Congress ought never to be construed to violate the law of nations [i.e., a treaty] if any other possible construction remains." *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

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[11] Under Art. VI of the Constitution treaties of course stand on the same footing as statutes and constitute "the supreme Law of the Land." So what is true of the canons of construction that govern the repeal of statutes, is equally true of the abrogation of treaties.

The explanation the Second Circuit gave in the *Cohiba* case for finding the protections of the Paris Convention abrogated *vis-à-vis* Cuba was that, "Legislative acts trump treaty-made international law when those acts are passed subsequent to ratification of the treaty and clearly contradict treaty obligations." *Empresa Cubana del Tabaco v. Culbro Corp., et al.* 399 F.3d 462, 481 (2d Cir. 2005) (quoting *United States v. Yousef*, 327 F.3d 56, 110 (2d Cir. 2003).

The court went on to say, "The most recent iteration of the Paris Convention by the United States was in 1970 . . . whereas the [Cuban embargo] regulations were reaffirmed and codified in 1996 with the passage of the LIBERTAD Act . . . (22 U.S.C. § 6032(h)). In these circumstances, any claim grounded in the Paris Convention that presented an irreconcilable conflict with the Regulations would be rendered 'null by the Regulations.'" *Id.* at 481. (Citing *Breard v. Greene*, 523 U.S. 371, 376 (1998)).

Because the LIBERTAD Act does not mention the Paris Convention, the Second Circuit *must* have based its decision in the *Cohiba* case on the belief that the Paris Convention was abrogated by implication when Congress codified the CACR in the LIBERTAD Act. The relevant provision of that statute states: "[t]he economic embargo of Cuba, as in effect on March 1, 1996, including all restrictions under the [CACR] shall remain in effect," until certain specified events relating to political and economic change occur in Cuba.

But, again, courts are to find legislation to have abrogated a treaty only when the intention by Congress to do so is "clear and plain," and there is no alternative to such a finding. *United States v. Dion*, 476 U.S. 734, 738 (1986); *Weinberger v. Rossi*, 456 U.S. 24, 32 (1982); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984). Abrogation by implication is found only when later legislation is in "irreconcilable conflict" or the legislation "covers the whole subject of the earlier [treaty] and is

clearly intended as a substitute." *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936); *cf. Restatement (Third) of the Foreign Relations Law of the United States § 115(1)(a) (1986)*.

The compelling reason for the rule heavily disfavoring U.S. abrogation of treaty commitments by implication is that, "If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such a manner as to violate international agreements." *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995).

The Paris Convention was not mentioned once in the course of LIBERTAD's passage through Congress. The Court of course disfavors the abrogation of treaties by implication; but here, there is not even a hint of such an implication – because none ever existed.

More generally, nothing in the LIBERTAD Act expressed an intention to do anything that would interfere with the existing regulatory structure of the Cuban Asset Control Regulations that, for nearly forty years, has promoted the reciprocal protection and enforcement of intellectual property rights between the U.S. and Cuba. Which returns us to the principle of statutory construction that ought to have been controlling in the *Cohiba* case: "A 'treaty will not be deemed to have been abrogated or modified by a later statute unless such *purpose* on the part of Congress has been *clearly expressed*.'" *Cook v. United States*, 288 U.S. 102, 120 (1933) (emphasis added) and *see also Chew Heong v. United States*, 112 U.S. 536, 539-40 (1884).

The law so plainly being what it is, it is impossible to understand how the Second Circuit reached the conclusion that the LIBERTAD Act's "codification" of the embargo somehow altered that embargo to abrogate U.S. treaty

obligations owed under the Paris Convention to Cuban nationals and companies – such as the Cuban creator and owner of the *Cohiba* cigar brand.

The National Foreign Trade Council's members rely on their trademarked brands to open new foreign markets and to maintain or increase their share of existing overseas markets. In the face of strong competition and rampant piracy, reliable protection and enforcement of those trademarks is essential to the success of their American owners in today's truly global trading system. To ensure the necessary protection and enforcement of its nationals' marks, the United States must comply with its treaty obligations by providing foreign companies with effective means to enforce their intellectual property rights in U.S. courts. That is why treaties like the Paris Convention should not be found to have been abrogated by legislation if any other construction is possible – and they must never, as happened in the *Cohiba* case, be found to have been abrogated by implication.

CONCLUSION

For the reasons given above, the NFTC urges the Court to grant the petition for *certiorari* in this case.

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